

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in)	WT Docket No. 02-55
the 800 MHz Band)	

ORDER

Adopted: January 8, 2007

Released: January 8, 2007

By the Associate Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this *Order*, we determine that 800 MHz public safety licensees engaged in rebanding pursuant to the Commission's orders in this docket may disclose or exchange information with other 800 MHz public safety licensees regarding the terms of Frequency Relocation Agreements (FRAs) and Planning Funding Agreements (PFAs) negotiated with Sprint Nextel Corporation (Sprint). We determine that allowing public safety licensees to disclose information to one another regarding the terms and conditions of their relocation agreements with Sprint will facilitate the rebanding process and is necessary to the conduct of good faith negotiations as required by the Commission. Accordingly, we find that allowing such disclosures is not prohibited by non-disclosure agreement (NDA) language in existing agreements between public safety licensees and Sprint, and we direct that future PFAs and FRAs negotiated by public safety licensees and Sprint allow for such disclosures. We also allow Sprint to make disclosures of FRA and PFA terms on the same basis as public safety licensees. We will not, however, allow licensees that have already negotiated PFAs or FRAs with Sprint to reopen negotiations based on this *Order*. In addition, this *Order* does not extend to 800 MHz non-public safety licensees or to non-licensees who are not parties to rebanding negotiations.

II. BACKGROUND

2. In July 2004, the Commission adopted the *800 MHz Report and Order (800 MHz R&O)* in this docket, which established a 36-month timetable for reconfiguration of the 800 MHz band to eliminate interference to public safety and other land mobile communication systems operating in the band.¹ The order provided a framework for negotiation of relocation agreements between Sprint and 800 MHz licensees, with the negotiation schedule to be administered by the 800 MHz Transition Administrator (TA).² The TA established a schedule

¹ See *Improving Public Safety Communications in the 800 MHz Band, Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004) (*800 MHz R&O*). See also *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004); *Memorandum Opinion and Order*, WT Docket No. 02-55, 20 FCC Rcd 16015 (2005).

² *800 MHz R&O*, 19 FCC Rcd at 15075-78 ¶ 201.

that groups 800 MHz licensees into four waves, and designated staggered starting dates for the negotiation periods in each wave.³ Under this schedule, Sprint has negotiated FRAs with most incumbent licensees in the lower portion of the 800 MHz band (current Channels 1-120). Negotiations have now commenced between Sprint and public safety licensees in the NPSPAC band, who will relocate to Channels 1-120. Many of these licensees have already negotiated PFAs, and some have negotiated FRAs.

3. In all PFAs and FRAs to date, the following NDA provision has been included at Sprint's request:

Confidentiality: The terms of this Agreement and any proprietary, non-public information regarding the Incumbent Frequencies, Replacement Frequencies, Nextel's business, Partners' business and Incumbent's business must be kept confidential by the Parties and their employees, shareholders, agents, attorneys and accountants (collectively, "Agents"), which confidentiality will survive the Closing or termination of this Agreement for a period of two (2) years. The Parties may make disclosures as required by law and to the Transition Administrator as required to perform obligations under this Agreement, provided, however, that each Party will cause all of its Agents to honor the provisions of this Section.

The effect of this NDA language is to prohibit public safety licensees from disclosing information to one another regarding the terms and conditions of their rebanding agreements with Sprint. As a result, public safety licensees in negotiations with Sprint do not have access to information about similar terms and conditions that have been negotiated by similarly situated public safety licensees in prior negotiations and mediations. Sprint, on the other hand, has access to information about all negotiations with public safety licensees because it is a common party to all negotiations and agreements.

III. DISCUSSION

4. We find that the continued application of the NDA language to prevent public safety licensees from disclosing information to one another about the terms and conditions of individual PFAs and FRAs negotiated with Sprint impedes the good faith obligations the Commission imposed upon both Sprint and incumbent licensees.⁴ Specifically we find that this practice undermines some of the specific factors the Commission stated were relevant to the determination of what constitutes good faith in this context: "the steps the parties have taken to determine the actual cost of relocation to comparable facilities" and "whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and

³ See "Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan," *Public Notice*, 20 FCC Rcd 5159 (WTB 2005). In each wave, negotiations occur in two phases on separate schedules: 1) Phase 1 consists of negotiations between Sprint and licensees in the wave who occupy Channels 1-120 in the 800 MHz band; 2) Phase 2 consists of negotiations between Sprint and licensees in the wave who occupy the NPSPAC channels.

⁴ See *800 MHz R&O*, 19 FCC Rcd at 15075 ¶ 201 ("All parties are charged with the obligation of utmost good faith in the negotiation process".)

procedures, requested by the other party.”⁵ We therefore find that allowing disclosures of PFA and FRA terms by public safety licensees to one another is not prohibited by NDA language in existing agreements, and we direct that future PFAs and FRAs negotiated by public safety licensees and Sprint allow for such disclosures. We also allow Sprint to make disclosures of FRA and PFA terms on the same basis as public safety licensees. We note, however, that this decision does not void any existing NDAs because the NDA language at issue provides that parties may make “disclosures as required by law,” which we construe to apply to the disclosures authorized by this *Order*.

5. A key characteristic of the rebanding negotiation process for 800 MHz public safety licensees is that there are substantial common elements in each negotiation. For example, each negotiation involves technical and cost issues relating to system configuration, replacement or retuning of mobile and portable radios, maintaining operations during the transition, and obtaining comparable facilities at the end of the rebanding process. These issues are similar in many cases because many public safety licensees use standardized equipment provided by a common vendor. While there is variation in the size and complexity of public safety systems, these common technical and cost issues are likely to recur in numerous negotiations. Thus, we anticipate increasing both the efficiency and speed of the rebanding process by eliminating the need for each licensee to negotiate every issue without the benefit of information from prior negotiations. These gains should be greatest with regard to negotiations on transactional costs common to many negotiations—such as labor rates, consultants’ fees, and legal fees—where the sharing of information will help establish a reasonable baseline for these costs that forestalls the need for protracted individualized negotiations on the scope and costs of each such service.

6. Another characteristic of the rebanding negotiation process is that it inherently creates an information imbalance between Sprint and individual public safety licensees because Sprint has access to information regarding all of its negotiations and mediations whereas each public safety licensee is limited to the information provided in the individual negotiations that it participates in. As a result, the NDA provisions in each agreement have relatively little impact on Sprint, which can draw on its experience and knowledge from hundreds of negotiations, and a much more significant impact on public safety agencies, which are prevented from disclosing to or receiving information from one another.⁶

7. We recognize that Sprint may have sought inclusion of NDAs in each agreement out of concern that individual licensees would otherwise look for the most favorable terms negotiated in other agreements as a basis for inflating their proposed costs, thus raising the overall cost of rebanding that would be incurred by Sprint. Sprint may also have been concerned that allowing exchange of information could create an incentive for licensees to attempt to delay their own negotiations while awaiting the outcome of negotiations by other licensees. We do not discount these concerns, although we believe that the likelihood of such conduct by public safety licensees is slight. Moreover, our decision allows Sprint to respond to a licensee’s negotiating position that Sprint considers unreasonable by citing to terms that it has negotiated in

⁵ 47 C.F.R. § 90.677(c)(3); *see also 800 MHz R&O*, 19 FCC Rcd at n.524.

⁶ Some public safety licensees have been allowed to share information because they are in jurisdictions where “sunshine” laws make PFAs and FRAs public documents. Other licensees have the benefit of their counsel or consultants having been involved in prior negotiations on behalf of other licensees. However, these avenues only benefit a small subset of licensees and do not enable access to complete or consistent information.

prior agreements. However, as we discuss below, the rebanding program has safeguards in place that make these risks unlikely in any event. In fact, we believe that allowing public safety licensees to disclose and exchange information at this point in the rebanding process is far more likely to help control overall costs and speed negotiations.

8. First, at this point in the rebanding process, a substantial number of PFAs and FRAs have been negotiated and approved by the TA as meeting the cost justification requirements established in the *800 MHz R&O*. As a result, allowing public safety licensees to disclose and exchange information about these agreements will generate a significant amount of data that can be used to help public safety licensees assess what costs may be considered reasonable in their future agreements.

9. In addition, we are not relying solely on disclosure of individual agreements to inform subsequent negotiations. To provide further guidance to public safety licensees in upcoming negotiations, we direct the TA to publish aggregated information regarding median costs for the key common elements of PFAs and FRAs that it has approved, broken down by the size and complexity of the public safety system. We anticipate that this information will provide a baseline for all cost negotiations and thereby help to speed resolution of cost issues.

10. Second, all public safety licensees remain obligated to document that the relocation costs provided for under their PFAs and FRAs are reasonable, prudent, and the “minimum necessary to provide facilities comparable to those presently in use.”⁷ These costs also remain subject to review and approval by the TA to verify compliance with this standard. Third, the actual costs associated with the rebanding of a system will be reconciled at the “true-up” once rebanding of the system has been completed, and the licensee must certify that the actual costs satisfy the “minimum necessary” standard. These safeguards provide an additional check on any potential attempt by a public safety licensee to use information regarding other agreements to inflate its own costs.

11. Our decision is confined solely to the applicability of NDAs to negotiations between Sprint and 800 MHz public safety licensees. It does not preclude parties to individual negotiations from seeking confidentiality for specific documents or information which, if disclosed, would demonstrably and substantially harm either party or otherwise be contrary to the public interest. For example, the Commission has stated in the *800 MHz R&O* that “we do not foresee any party having access to competitively-sensitive information such as the identity and other details of an incumbent’s customers.”⁸ We also recognize that there may be a legitimate need to keep certain information about public safety systems confidential for security reasons. However, any request in negotiations to include NDA language that would prohibit disclosure of terms in a PFA or FRA must be narrowly tailored and clearly justified under the “good faith” negotiation standard as interpreted in this order.

12. Moreover, we confine our decision here to the disclosure of information regarding PFA and FRA terms by and to public safety licensees.⁹ We make no finding with respect to

⁷ *800 MHz R&O*, 19 FCC Rcd at 15074 ¶ 198.

⁸ *Id.* at 15078 ¶ 203.

⁹ In addition, our *Order* allows the TA to disclose information regarding PFAs and FRAs on the same basis as public safety licensees and Sprint.

disclosure of equivalent information by or to 800 MHz non-public safety licensees. In contrast to the public safety context, negotiations between Sprint and non-public safety licensees (some of whom are Sprint's competitors) may raise competitive or business issues that merit confidential treatment, and NDAs in contracts between commercial entities to address such issues are not uncommon. We also note that because most relocating 800 MHz non-public safety licensees are in the first phase of the rebanding process (*i.e.*, the clearing of Channels 1-120), the majority of these licensees have already negotiated FRAs with Sprint. In light of the relatively small number of 800 MHz non-public safety licensees that have yet to complete negotiations, allowing disclosure of information in the non-public safety context would be unlikely to have a significant beneficial impact on the efficiency or overall pace of negotiations.

13. This *Order* is intended to streamline the rebanding process by assisting the efforts of public safety entities in ongoing and upcoming negotiations to meet their good faith obligations of accurately determining the actual cost of relocation to comparable facilities. It is not intended to allow licensees that have already negotiated PFAs or FRAs with Sprint to reopen negotiations based on information that may be disclosed about other agreements. Moreover, we caution licensees that this *Order* does not obviate their obligation to certify that their claimed services and costs are reasonable, prudent, and the minimum necessary to complete the rebanding process and obtain comparable facilities.¹⁰ While information derived from other negotiations will allow licensees to craft more accurate determinations of their rebanding costs, such information is not, by itself, dispositive of the reasonableness of a licensee's claimed services and costs. Rather, each licensee must continue to document and justify such services and costs as required by the Commission's orders in this docket. Licensees' conduct in this regard will be subject to scrutiny under the good faith standard.¹¹

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r) that this *Order* IS HEREBY ADOPTED. This action is taken pursuant to authority delegated by Sections 0.191(f) and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191(f) and 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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¹⁰ 800 MHz R&O, 19 FCC Rcd at 15074 ¶ 198.

¹¹ 800 MHz R&O, 19 FCC Rcd at 15075 ¶ 201.